

Mailing:  
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This Opinion is Not  
Citable as Precedent  
of the TTAB

Paper No. 9  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re InjectiMed, Inc.

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Serial No. 76/212,813

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Matthew A. Newboles of Stetina Brunda Garred & Brucker for  
InjectiMed, Inc.

Verna Beth Ririe, Trademark Examining Attorney, Law Office  
105 (Thomas G. Howell, Managing Attorney).

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Before Quinn, Chapman and Rogers,  
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

InjectiMed, Inc., by the above-identified application, applied to register, on the Principal Register, the phrase NO EXPOSURE TIME for goods identified as "shielded medical needles; safety device for hypodermic needles" in International Class 9. While the application is based on applicant's assertion of its intention to use the phrase in commerce and has not been amended to assert actual use in commerce, it appears that applicant may have begun using

the phrase on or in conjunction with its goods shortly before the February 20, 2001 filing date of the application.<sup>1</sup>

Registration has been refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1). The examining attorney's position is that, when used in connection with applicant's goods, NO EXPOSURE TIME will be merely descriptive of them.

When the examining attorney made the refusal final, applicant appealed. Both applicant and the examining attorney have filed briefs; oral argument was not requested.

The Office bears the burden of setting forth a prima facie case in support of a descriptiveness refusal. However, when the examining attorney sets forth a prima facie case, the applicant cannot simply criticize the

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<sup>1</sup> The application form applicant filed has different sections and allows the filer to select one of three bases (i.e., use in commerce, intent to use, and Section 44). The identification of goods is to be inserted in the section that corresponds to the chosen basis.

Applicant inserted the identification of goods in the intent to use section, and there is no specimen of use in the file. Nonetheless, in the section to be completed by an applicant basing its application on use in commerce, applicant listed 1998 as the date of first use anywhere and 2001 as the date of first use in commerce. The examining attorney did not make inquiry of the applicant to clarify the basis and/or seek more definite dates of use. Thus, it appears that the use dates were treated as surplusage.

absence of additional evidence supporting the refusal, but must come forward with evidence supporting its argument for registration. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). To meet the Office's burden, the examining attorney has introduced copies of excerpted stories retrieved from the NEXIS database. Three, which we list below, include the phrase "exposure time":<sup>2</sup>

HEADLINE: Product Focus: needlestick prevention; medical supplies

...Safetyglide enables its user to shield the needle tip immediately after injection with a sin[g]le fingerstroke. It limits needle tip exposure time to 1.6 seconds, compared with a standard hypodermic needle's average 8-second exposure. The needle is available in ...  
*Nursing Management*, January 1, 1999.

HEADLINE: Winning over Doctors in China, India  
Safetyglide needles: this new product reduces needle exposure time by 75%, lowering the risk of injury to healthcare workers.  
*Business Times (Singapore)*, December 15, 1997.

HEADLINE: Innovative new equipment lowers risk of needlesticks

...Any device that eliminates this problem is worthy of serious consideration. Many health care professionals describe this priority as the need to minimize exposure time to the contaminated sharp needle. Since outer sheathing devices are deployed some time after the needle is removed from the patient, they reduce but do not eliminate exposure time.

Studies at the University of Iowa Hospitals and Clinics indicated that the likelihood of an

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<sup>2</sup> The reprinted excerpts are three of only four "hits" retrieved by the search query "'exposure time' w/10 needle!." [In NEXIS search parlance, the exclamation point is a search qualifier, not a punctuation mark.]

accidental needlestick immediately following a blood...

*Health Facilities Management*, October 1996.

Also of record are all eight excerpted stories retrieved by the search query "(shielded w/2 needle) w/60 exposure!." Each of these refers to shielded needles or shielded needle devices in the context of discussing programs to control, reduce or prevent exposures of health care personnel to needles and other contaminated "sharps."

The final item we have considered as part of the record is a dictionary definition of which we take judicial notice:

"exposure-prone procedures" As defined by the Centers for Disease Control and Prevention, procedures during which a health care worker's fingers and a needle or other sharp object are both in a poorly visualized or highly confined anatomic site.

*LEXIKON Dictionary of Health Care Terms, Organizations, and Acronyms* (Second ed. 1998).

In regard to the weight to be accorded the excerpted stories from the NEXIS database, we note that, of the three that we have reprinted above, one apparently is from a foreign publication. Of the eight other excerpted stories to which we have made reference, one is a wire service report and another is a duplicate. We have not considered the wire service report, because it cannot be assumed that

it has been seen by consumers. See In re Patent and Trademark Services Inc., 49 USPQ2d 1537, 1538 fn 2 (TTAB 1998). Likewise, we have not considered the foreign publication, because the focus of our analysis is on the perception of NO EXPOSURE TIME in the United States. See In re Urbano, 51 USPQ2d 1776, 1778 fn. 3 (TTAB 1999).

Applicant argues that the excerpted stories retrieved from the NEXIS database referring to "exposure time" show it is a phrase "used as a measurement of time" and is not, therefore, descriptive of a product and particularly not applicant's product which is "far beyond" a mere time measurement device. In addition, applicant notes that the examining attorney has argued "that a prolonged amount of exposure time poses a problem, and it is favorable to limit such time in order to alleviate this problem." Applicant argues, based on this observation, that NO EXPOSURE TIME is not descriptive because the examining attorney has clearly utilized "complex analytical deduction... to attempt to make the assertion that Appellant's mark is merely descriptive of its goods." Finally, applicant argues that no consumer encountering NO EXPOSURE TIME "would immediately know that Appellant was providing shielded medical needles" and instead "could just as easily" take the phrase as

references to X-ray exposure of film or UV light exposure of skin.

To the extent applicant is asserting that because NO EXPOSURE TIME is a reference to measuring time, it does not describe a property of applicant's products, we disagree. It is well settled that a term can be held merely descriptive of a product if it describes "a function, or purpose, or use of the goods ... a feature or part of the goods [or] information about any properties of the goods." In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978) (footnotes omitted). In this case, to the extent that a nurse or doctor or other medical staff person utilizing one of applicant's shielded medical needles will suffer "no exposure time," the phrase clearly and directly describes a significant feature of function of the goods, i.e., the avoidance of exposure time vis-a-vis the needle. Moreover, the descriptiveness of a term or phrase is assessed not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is used or is intended to be used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser or user of the goods or services. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979) and In

re Recovery, 196 USPQ 830 (TTAB 1977). Thus, the question is whether doctors and nurses, or other personnel responsible for purchasing or using shielded medical needles and safety devices for hypodermic needles, would, when such products are marketed under the phrase NO EXPOSURE TIME immediately know something about such products. The question is not whether such individuals would, considering the phrase in the abstract, first think of applicant's types of products or some other type of product or service.

Finally, we do not believe that the examining attorney has engaged in, or any prospective purchaser or user of applicant's goods would have to engage in, a multi-step reasoning process to conclude that NO EXPOSURE TIME, when used on or in connection with applicant's identified goods, means that the goods shield the user from exposure to the needle.

The totality of the evidence reveals that those in the medical field (and government agencies such as OSHA and the CDC), are concerned with the extent to which health care workers suffer "exposure" to contaminated (or potentially contaminated) needles. Though we do not dispute applicant's point that the phrase "exposure time" would be a reference to chronological time, we discern no

incongruity or ambiguity that results from coupling "exposure" with "time." Nor does the addition of "no" to "exposure time" result in any ambiguity or incongruity. Thus, the phrase "no exposure time," would have immediate significance for relevant purchasers or users (i.e., those in the medical field) considering the phrase in conjunction with shielded medical needles or safety devices for hypodermic needles.

Decision: The refusal of registration under Section 2(e)(1) of the Trademark Act is affirmed.